Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

FRANK B. CARABELLO, Petitioner

V

SHARON R. CARABELLO, ET AL.[1], Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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[FN: ET AL.[1]]- In the Supreme Court of Kentucky, whose Order is sought to be reviewed, the parties were Sharon R. Carabello and Rebecca K. Kaye. Joseph F. Bamberger was not a party there, but all three are considered to be parties in this petition.

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Frank B. Carabello, Petitioner, respectfully prays that a Writ of Certiorari issue to resolve questions involving federal rights in Frank B. Carabello v. Sharon R. Carabello, et al. The Supreme Court of Kentucky denied review of a decision dismissing redress on orders entered in this case by the Kentucky Boone Circuit Court (hereafter Circuit Court). Access to the merits in the case and to rights were denied under state use of rules citing federal authority and Circuit Court orders that injure, exercise final force and deprive vested constitutional rights, pursuant to that authority.

QUESTIONS PRESENTED FOR REVIEW

This calls into question: whether the public has adequate timely redress for judicial orders that are repugnant to the Fourteenth Amendment to the United States Constitution.

The Kentucky Rules of Civil Procedure (KRCP) involved in this Petition cite the Federal Rules of Civil Procedure (FRCP) as their authority. Rule 54.02(1) of the KRCP states:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (Source: FRCP 54(b).)

This rule was applied in this case as a supreme edict, that overrides redress on unconstitutional deprivation. A question thus presented is: whether KRCP 54.02 is superior to rights vested by the Fourteenth Amendment, in essence, a supreme and unchangeable edict, overriding all conflicting

rights of property, due process and equal treatment. The rule was applied to hold Circuit Court orders as non-final, despite these being manifestly final and injurious in force and effect on their face. These are final as to awards on equity claims and concurrently defeat offset for injury claims. KRCP 18.02(1), adopted from FRCP 18(b), states:

> "Whenever, a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantial rights of the parties."

KRCP 18.02(1) is important, because the case involves equity diminished by injury before claims were adjudicated. Claims were amended for damages prior to the hearing of equity issues. But, the Circuit Court Judge, Respondent J. Bamberger, refused to determine damages and distributed the equity without adjustment for diminished values. Another question is thus: in an action where equity diminished by injury makes equity claims not cognizable before damages are resolved—whether injurious orders for equity division are acts of deprivation under color of law, liable to redress in federal court, being, in essence, acts outside jurisdiction and a trial judge's will to shield tortfeasors, by misusing language of the form set forth in FRCP 54(b) to deprive vested federal rights.

Refusal of relief and dismissal of appeal of such orders, holds a party captive to willful and injurious deprivation of vested rights. The final question thus is: whether appellate state court(s) have duty to do more than refuse appeal and relief solely on language of the form set forth in FRCP 54(b), when an injured party appeals issues of abuse, misuse of rules and orders that manifestly deprive vested federal rights.

LIST OF PARTIES AND OTHERS NOTIFIED

The Parties in this proceeding are Ms. Sharon R. Carabello, Hon. Rebecca K. Kaye and Hon. Joseph F. Bamberger. Others notified of this proceeding are the Attorney General of Kentucky, the Chief Justice of the Supreme Court of Kentucky, and the Judges of the Court below that Court

entering orders pertaining to the Order of said Chief Justice. The addresses Petitioner will use for mailing copies of papers to the Parties and others notified are:

Ms. Sharon R. Carabello (hereafter former wife) is a party. She married Petitioner on October 19, 1985. Legal decree of separation was by Circuit Court Order entered on December 29, 1993. Equity division and distribution thereto was made final in force and effect by Circuit Court Orders entered in July, 1996. Her last known address is 9403 Waxwing Drive, Cincinnati, Ohio 45241, and mailing to her will be to her counsel (below).

Honorable Rebecca K. Kaye is an Attorney at Law licensed to practice in Kentucky. Her business address is The Kroger Bldg. Suite 2525, 1014 Vine Street, Cincinnati, Ohio 45202-1144. She is legal counsel for former wife and a party from the appeal in Kentucky.

Honorable Joseph F. Bamberger is a Judge of the Circuit Court and a party for judicial acts outside jurisdiction. His business address is Old Boone County Courthouse, 2nd Floor, P.O. Box 480, Burlington, KY 41005.

Honorable Robert F. Stephens is the Chief Justice of the Supreme Court of Kentucky. His business address is Room 231, 700 Capital Avenue, Frankfort, KY 40601.

The business address of the Honorable Sara W. Combs, Judge, Kentucky Court of Appeals, is 323 E. College Ave., P. O. Box 709, Stanton, KY 40380.

The business address of the Honorable Wilfrid A. Schroder, Judge, Kentucky Court of Appeals, is Suite 109, 2734 Chancellor Dr., Crestview Hills, KY 41017.

The business address of the Honorable Anthony M. Wilhoit, Chief Judge, Kentucky Court of Appeals, is 151 S. Main Street, Versailles, KY 40383.

The business address of the Attorney General of Kentucky is Capital Building, Suite 118, Frankfort, KY 40601-3449.

Petitioner, a citizen of the United States and resident of Pennsylvania, prior to 1996, was a resident of Kentucky for about fourteen years. There, he was deprived of livelihood and property (1994-7) under color of law. The parties named, supra, are tortfeasors in that deprivation, who entered or

acquired property by Circuit Court order. Others involved in the deprivation are not named as parties in this Petition, because their tortious acts must be claimed in federal district court. Despite that, all of the above judiciary denied redress, and thus, all those listed within, including those not named as parties, will be mailed copies of this Petition.

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[FN2] - ☑ denotes verbatim quote of amendment or rule.

I. OPINIONS BELOW

The Supreme Court of Kentucky, without opinion, entered the Order in this case, a copy of which is appended to this Petition (see Appendix for Order (A) in 97-SC-150-D). The Order denied discretionary review of an unpublished decision and order of the Kentucky Court of Appeals, a copy of which is appended to this Petition (see Appendix for dismissal order (B) in 96-CA-2299-MR). Copies of the orders of the Circuit Court in this case are appended to this Petition (see Appendix for orders (C1 - C3) in 93-CI-561). A copy of the motion for discretionary review (D1) in 97-SC-150-D appears in the Appendix to this Petition, along with orders denying interlocutory relief in 96-SC-1128-I (D2) and in 96-CA-2299-MR (D3). Other relevant papers appear in the fifth section of the Appendix. These include a memorandum (E1) on cause for interlocutory relief, filed in 96-CA-2299-MR, and order (E2) of the Kentucky Court of Appeals entered October 8, 1996, and affidavit (E2) in compliance thereof. Also included there are the first two pages of pre-hearing statement (E3) filed in 96-CA-2299-MR, and order (E4) denying mandamus.

II. JURISDICTION

The Order of the Supreme Court of Kentucky (A) was entered on August 27, 1997. The jurisdiction of this Court is invoked under 28 USC §1257.

III. CONSTITUTIONAL PROVISIONS

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. That section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

any person within its jurisdiction the equal protection of the laws."

IV. STATEMENT OF THE CASE

i. This constitutional provision is violated by the Order (A) of the Supreme Court of Kentucky allowing Order B and the Circuit Court orders of July 12 (C1 §1 - §3) and July 23, 1996 (C2) to remain in effect. C1 and C2 are unconstitutional and final in force, despite language of KRCP 54.02 missing from these. The motion cited in C1 §1 clearly conflicts with C1 §3 and C2 and shows these are acts outside of jurisdiction. These divide equity (C1 §3) and distribute thereon (C2), which are acts of deprivation circumventing the motion cited in C1 §1, without due process of law, and denying equal protection of the law. Remand in C1 §1 was decided (B) to bar appeal, despite the deprivation in C1 §3 - C2, that defeats the motion cited in C1 §1. The remand, thus, was manipulated to defeat the subject matter manifest from the title of the motion. This is an oppressive manipulation of issues preventing all adjustment and relief due for injury. C1 - C2 orders also deprive jury right by circumventing the purpose of motion shown in C1 §1. (See page 5, at § xi, infra, for reasons the motion was made.) Thus, the C1 - C2 orders are acts of unconstitutional deprivation that preferentially treat equity claims, defeat injury claims and equity adjustment therefor, and obstruct redress of other unconstitutional acts, that were presented for appeal in pre-hearing statement (E3) and in other papers (D1, E1). The denied appeal (A - B) is refusal of state to exercise will of the law. The Kentucky court records show access to rights repeatedly was denied in the present case. This included denied rights (a.) to a contract, (b.) to ability to sustain business, (c.) to injury claims, (d.) to assets in escrow and frozen accounts, (e.) to relief by mandamus, (f.) to interlocutory relief and appeal, and (g.) to all state court redress for abuse.

ii. The injury came from tortious acts committed and/or concealed under color of law, by misuse of Circuit Court powers. Petitioner was sole owner of Keyline, a business that he founded in 1981. ***Keyline was his livelihood and***

forced to terminate in 1995. (*emphasis added.*) This is the injury remanded in C1 §1. Judicial officers in Circuit Court were joint tortfeasors. They failed to enforce a contract on May 18, 1994. That led to interference at Keyline on June 11, 1994 and to loss of sales the next day. Injury progressed 1994-7 to destruction of livelihood and to illegal deprivation of property, under color of law, from Circuit Court refusals to grant vital relief and access to vested rights.

iii. Petitioner respectfully requests the Court to note that time is of the essence, because remand to Circuit Court puts unresolved issues in the hands of tortfeasors. Petitioner has cause to avoid more Circuit Court abuse, as that Court willed and executed C1 §3 and C2, and knowingly ordered C1 §1 to obstruct appeal and due relief. Moreover, Circuit Court orders have been taken to Ohio and Indiana for malicious prosecutions made to appear credible by the Circuit Court.

iv. Other state action was made to appear credible, because the Circuit Court did not trace most property awarded (in report adopted by C1 §3). It could not do that because the property was diminished by injury. It suppressed evidence as to that and used 1992 values that are invalid. The report adopted by C1 §3 listed 1992 property and assigned division by total value so as to not trace property lost to injury. C2 did not provide for 100% of the non-traced total value, and thus, former wife was empowered to commence other state action. Petitioner does not have remedy available in the state trial courts, and those (in Ohio and Indiana) have acted on C1 §3 as if it were a final order.

v. Refusal of discretionary review (A) left standing the decision of the Kentucky Court of Appeals (B), which is an unconstitutional misuse of KRCP 54.02. Motion for discretionary review (see Appendix, D1) argued this, in essence, that KRCP 54.02 is not a supreme edict overriding all vested federal rights. The decision (B) also disregards cause for interlocutory relief (see Appendix, E1) and withdrawal of bankruptcy on disobedience to stay thereon. It disregards the issues raised on appeal in the pre-hearing statement (E3), and the facts in this case (some of which are shown in Appendix, D-E). But, most of all, use of KRCP 54.02 (to dis-

miss appeal and relief) disregards the unconstitutional acts on the face of the appealed Circuit Court orders (C1 - C3).

vi. The appeal came from claims in Circuit Court for equity division in a divorce action amended for injury to subject property and to livelihood. The relief under these claims is controlled by KRCP 18.02. That rule allows claims that are not yet cognizable, but requires that relief shall be granted only in accordance with the relative substantial rights of the parties. In a case where equity is diminished by injury, the equity division is not cognizable until the injury is determined. Therefore, C1-C2 are ordered acts outside jurisdiction.

vii. Rules KRCP 18.02 and 54.02, considered jointly, disallow equity relief to one party when that deprives opposing party's rights. The Circuit Court defeated injury claims and misused KRCP 54.02 to enforce and conceal liability for injury, which that Court contributed to (1994-7) by refusing access to relief. Albeit the original action in Circuit Court commenced in 1993 and was merely equitable division to end a seven year marriage, joint tortfeasors used obstruction as means for injury that has far surpassed the original amount subject to division. That injury has progressed to about $1,500,000.00 on loss of livelihood. By refusal to enforce a contract, on May 18, 1994, $54,000.00 was lost in Keyline sales. From that point forward, judicial officers of the Circuit Court used their powers to cover up that injury and the non-enforcement of contract, to wit: by withheld rights through unconstitutional treatment, including tabled requests and preferential decisions (on contract terms, remedies, jury access and unjust orders authorizing injury). The Circuit Court orders, C1-C2, continue this selective, unconstitutional treatment. The deceptive use of remand in C1 §1 misapplies civil rules and misuses Petitioner's motion for more injury, deprivation and cover up by means of delay of appeal.

viii. KRCP 54.02 is not authorization to exclude "final" language from equity division orders, to deprive vested rights, and to make unjust orders non-appealable and means for more abuse. Denied appeal is cause of immediate injury. Injury is remanded to Circuit Court where the record is

replete with prior injurious, illicit acts. The fact is that no remedy other than appeal is now available in any state court.
ix. The Circuit Court orders divested property illegally seized and delayed right to timely trial on injury. Questions as to deprivation of federal rights raised therein were overruled several times, lastly in order appended as C3. The orders therein (C1 - C3) shield liability for injury and cover up tortious acts. Mandamus was sought to mitigate injury but it was denied (see order of April 5, 1995, Appendix E4). Two years later relief on appeal was denied (Appendix, A - B). Interlocutory relief was refused (D2, D3, E1). Thus, relief on tortious acts was denied repeatedly since 1994. This has held the Petitioner captive to the illicit will of the Circuit Court.
x. His treatment there has been a violation of the due process and equal protection clauses of the Fourteenth Amendment. Thus, federal relief is appropriate. Color of state law is a federal issue, Marshall v Sawyer (1962, CA9 Nev) 301 F2d 639, 5 FR Serv 2d 73, and that is present here. Procedural due process is meant to protect against unjust deprivation of life, liberty or property. See Carey v. Piphus (1978) 435 US 247, 55 L Ed 2d 252, 98 S Ct 1042. Being held captive to remand (C1 §1), after the stated purpose of the motion remanded is defeated by KRCP 54.02, shows intent to deprive a party and subject him to unending injury. Equity claims were manipulated to intentionally circumvent injury issues, to prevent ability to recover damages in state court. Most joint tortfeasors are not party to the remanded state action, and are indispensable parties for remedy. Redress is no longer available in Circuit Court.
xi. The motion cited in remand was made to stay equity division. Jury demand was made in Circuit Court to require a jury verdict prior to equity division. These were defeated by delay, that is, refusal of timely access. The withheld KRCP 54.02 language, per se, holds Petitioner captive to unending progressive injury from delay and to rule by men and not law. This is analogous to captivity in a war camp, where injury is inflicted a little at a time to weaken a prisoner's will to continue his cause. Returning Petitioner to Circuit Court action (under the C1 §1 remand provision) is manifest in-

justice. Nothing pending there has any prospective application, since former wife is the only party named in the action. Remand to that Court can not possibly serve justice, and judgment against former wife is no longer adequate.

xii. Petitioner seeks relief from Circuit Court orders and from all state trial court action pursuant these. He prays for Certiorari to void the C1 - C3 orders and the injury willed therein, and to reinstate appeal. Petitioner contends that relief is indicated by the acts outside of jurisdiction shown on the face of the orders. Moreover, the Circuit Court records will show tortious acts concealed under color of law, including erroneous findings, suppressed evidence, deprived property and rights, and withheld duty. The Kentucky appeal is necessary to establish these matters without further delay, so that Petitioner can proceed with action in federal district court unimpeded as to these.

V. REASONS FOR GRANTING WRIT

i. This Petition is about intentional misuse of state judicial powers, deprivation and captivity to abuse. Denied appeal enforces deprivation and transfer of property to opposing parties and an unconstitutional obstruction of due process. Clearly, a person injured by judicial abuse should not be remanded to the will of joint tortfeasors for more abuse. A citizen must be able to trust that he will have timely access to his rights. Remand to a state trial court that routinely has denied these, merely, returns a party to the injurious will of a judge, who has proven intent to abuse powers. On the matter of discretion, Littleton v. Berbling (7th Cir. 1972) 468 F 2d 389 at 412, quoting Chief Justice Marshall, put that in perspective as follows:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving the will of the judge; always for the purpose of giving the will of the legislature; or, in other words, to the will of the law."

ii. The denied appeal is refusal of state to exercise will of the law. The right to due process and equal treatment, which was denied by the misuse of rules, is the indispensable condition guaranteed by the Fourteenth Amendment. The orders cited in this Petition, in essence, all refuse or dismiss access to the merits. That is tantamount to rule by judiciary not discerning the will of the law. The tendency of the law in this country is to enforce rights, not to dismiss them through orders that lack certain language.

iii. Certiorari should be granted to address the unconstitutional application of KRCP 54.02 by the Kentucky courts. Moreover, it should be granted to restore property and rights deprived in a manner repugnant to the Fourteenth Amendment. Although Petitioner's cause of action involves federal questions, reinstatement of appeal in Kentucky is important. The reasons for that appeal are (a.) to restore or provide surety for assets released, (b.) to establish erroneous findings, unconstitutional suppression of evidence, and wrongful acts evidenced in the Circuit Court records that make res judicata in C3 invalid, and (c.) to stop injury from progressing, by reversing and voiding the Circuit Court orders and action in other states. Another reason for that appeal is to show remand to Circuit Court is manifestly unjust, to wit: involves joint tortfeasors, equity division on acts outside jurisdiction, and injury that must be resolved in federal court. If remand is not stopped, Petitioner will completely lose vested rights by more delay and injury that must prevent all access to court.

iv. The reasons Certiorari should be granted include the aforementioned and the matter of public trust in due process. The cause of injury in this case indicates a need for an opinion, as to application of rules, where injury claims arise from improper state litigation of equity matters. Proper application of rules on multiple claims is essential for preserving vested federal rights. In this case, misuse of rules caused great and irreparable injury. An opinion of this Court, as to rules for adjudicating claims of equity and law, may assure the public of adherence to due process. As to other cause for granting Certiorari, Petitioner reviews the supporting circumstances, as follows.

v. Mandamus denied in 1995 (E4) disregarded this authority (also see Appendix, E1- page 6):

> "If the complaint requests a money judgment . . . . it is unquestionably legal, Dairy Queen IC v. Wood, 369 US. 469, 476, 82 S Ct. 894, 899, 8 L. Ed. 2d 44, 50 (1962)., and if . . . two issues, one legal and one equitable, ...a jury trial is required as to both", Dobbs - Law of Remedies, (1993) Ed. 2d, §6.10(5), Vol. 2, at 225.

Overall, the authority was disregarded three times by the Kentucky high courts, without opinion as to merits, by orders (E4 and D2 - D3 on review of E1), after the issue had been tabled in 1995 in the Circuit Court action. The authority shows that a jury trial is required as to both equitable distribution and damages. Instead, right was refused and trial by commissioner was substituted (March 20, 1995) for jury. Order of July 12, 1996 (C1) adopted report of commissioner and order of July 23, 1996 (C2) deprived property (pursuant to C1). KRCP 38.01 adopts the federal rule as to jury, to wit:

> "(right . .) shall be preserved to the parties inviolate, FRCP 38(a)".

In the present case, the rules were used to manipulate rights (to jury, damage, contract and relief issues). KRCP 54.02 and remand in C1 §1 were then used to deprive appeal of abuse and claims which had already been defeated. Jury demand (made in 1995) clearly was left unresolved, to distribute equity prior to adjustment for damages to the subject property. This illicit will is evident from the orders that were entered in 1996 (C1 - C3).

vi. Since Kentucky has adopted its rules of civil procedure from the corresponding federal rules, Kentucky has shown clear intent to comply with the related parts of The United States Constitution and Amendments thereto. The due process and equal protection clauses of the Fourteenth Amendment state:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Kentucky orders disobey these clauses. They keep justice out of Petitioner's reach by refusing due access on the merits. This has gone on for such a long time that injury now is at $1,500,000 and far surpasses the amount of equity to be divided in the divorce action. The public trust in equal justice for all is violated by such misuse of laws and rules and abuse of rights.

vii. Other state action was made to appear credible by the Circuit Court, because it did not trace distribution. Moreover, in the order (C2) to release funds, the Circuit Court was unconcerned with property not subject to equity division and awarded pre-marital property of Petitioner to former wife. This is forbidden by Kentucky law, KRS 403.190(1), which states "the court shall assign each spouse's property to him", that is, shall restore it to the original owner. Albeit report adopted in C1 §3 found IRA at Dean Whitter Reynolds, Inc. was Petitioner's, C2 distributed it and other pre-marital property to former wife and C1 §1 prevented redress in higher Kentucky courts. Thus, even his pre-marital property was deprived under color of C2. Overall, omission of KRCP 54.02 language was used for deprivation, prevention of redress, and to hold Petitioner captive to the will of the trial court and empower more injury.

viii. This Petition is because only this Court has the power to reverse an order of the Supreme Court of Kentucky denying discretionary review; Warringer v Fink (1962) 307 F 2d 933 at 933 and at 936. The remand to Circuit Court should be reversed, as all redress in Kentucky has been denied. Moreover, Petitioner's repeated, diligent attempts to mitigate the injury have been defeated by abuse of discretion. That has made state remedy unavailable, and thus comity and federalism do not apply. (Younger v Harris, (1971) 401 US 37, 43-46, 91 S Ct 746, 27 L Ed 2d 669.) In citing cause for federal intervention, Littleton v. Berbling (7th Cir. 1972) 468 F 2d 389 at 412 quoted the following:

> "the above consideration shows the 'great and immediate' irreparable injury being suffered by plaintiffs to justify intervention under Younger v Harris, *supra*, 401 U.S. at 46, 91 S. Ct. 746".

Kentucky orders rule as if our government is of men and not of laws. That has been held to be actionable, as Littleton v. Berbling (7th Cir. 1972) 468 F 2d 389, at 402-3 also stated:

> "every right, when withheld, must have a remedy and every injury its proper redress."
>
> "The government of the United States has been emphatically termed a government of laws, and not of men. It certainly will cease to deserve this high appellation, if laws furnish no remedy for the violation of a vested legal right. . . . Marbury v. Madison, 1 Cranch (5 U.S.) 137, 162-163, 2 L Ed. 60 (1803)."

The remand to Circuit Court affords no remedy and returns Petitioner to the will of joint tortfeasors. In 1994, the initial injury was just $54,000 in immediate loss sales that could have been remedied by Circuit Court doing duty. Instead it withheld access to remedy by tabling action and other refusals. If Petitioner asked for federal remedy on his initial injury of $54,000, it would have been barred by the principles of comity and federalism. But, that reasoning can not serve the doing of substantial justice now that injury is at $1,500,000. Non-judicial tortfeasors acted under the shield of Circuit Court refusals to grant timely court access. Federal district court action is required to fashion a proper remedy as to this injury.

ix. As Circuit Court judiciary empowered injury, the intent of judicial immunity is briefly reviewed here. Immunity, it appears, is a factor in the context that federal district court redress is needed in addition to this Petition, since a state civil trial affords no remedy for injury caused by abuse of judicial powers. There are two concerns as to immunity. One is that of access to a state judge's liability for substantial injury. The other is that of access to state court records of injurious deprivation, and thus, to liability of non-state actors shielded by acts provable only upon inquiry into those records. Either would impair justice, in a case where a judge chose to impose his will over duty. Both concerns are a matter of substantial public interest, because these both represent obstacles to redress for deprivation of vested rights. The concerns are those of any citizen deprived by

judicial abuse and held captive to it by misapplication of rules (for example, by a remand that affords no remedy).

x. The injurious abuse involved a willful and unequal application of rules and laws. It seems not to be a foregone conclusion that immunity lies to bar individual liability for injury imposed by judges exercising their will over the superior power of the Constitution. In Scheuer v Rhodes, (1974) 416 US 232, 94 S Ct 1683, 40 L Ed 2d 90, criteria for immunity were established by this Court. Albeit, in Scheuer, the task was to determine application of common law immunity to acts of a "governor or other executive officer", the following rationale seems still to apply if the word "judge" is inserted at appropriate places. It is stated (Id. at 103), that:

> "Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' Sterling v Constantin, 287 US at 397, 77 L Ed 375, 53 S Ct 190. In Sterling, Mr. Chief Justice Hughes put it in these terms:
>
> > 'If this extreme position could be deemed to be well taken, it is manifest that the flat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land;' "

This Court also held in Scheuer, 40 L Ed 2d 90 at 99, that:

> "Immunity for the other two branches—long a creature of the common law—remained committed to the common law. See, e.g., Spalding v Villas, 161 US 483, 498-499, 16 S Ct 631 (1896)."

This reference is to both state judiciary and top echelon state executives deriving immunity for the same reasons from common law. Thus, it appears appropriate to substitute the word "judge" as suggested above. If so, then, the aforementioned "will of men" to misuse KRCP 54.02 for deprivation, per se, may establish a cause of action in federal court as to civil liability for deprivation done under color of state

law, at least sufficient to justify judicial inquiry into the court records as to injury coming directly from deprivation. Immunity lies for acts done within the role of office and in discharge of duty. But, in Scheuer (40 L Ed 2d 90 quoting Sterling v Constantin at 104), it is stated:

> "There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." Sterling v Constantin, 287 US at 397-398, 77 L Ed 375, 53 S Ct 190.

This was interpreted and unanimously held (Id. at 91) to mean:

> "immunity of the defendants for their acts is not absolute but a qualified immunity varying in scope of discretion and responsibilities of the office and all circumstances as they reasonable appeared at the time of the action on which liability was predicated".

xi. If immunity lies for a state judge, who injures by imposing his will over that of the Fourteenth Amendment or who wills deprivation by acting outside of jurisdiction, it would strip that Amendment of all meaning in matters of judicial abuse. It also would strip the rules of procedure of all meaning and thereby aid the deprivation of vested rights. State judges who routinely provide access to due process and equal treatment, as the majority do, apply rules in a manner to assure justice. But, Petitioner has not had access to justice since 1994 and that cost him his livelihood. At age 57, having to reestablish his livelihood to prepare for retirement is a substantial, possibly impossible, task. Citizens are entitled to better treatment in state trial court. Judicial immunity should not bar civil liability for illicit acts of intentional deprivation.

xii. The Teeney v Brandhove, (1951) 341 US 367, 71 S Ct 783, 95 L Ed 2d 1019, finding of no specific intent of Congress to abrogate common law immunities, as commonly applied to immunize judiciary in various other cases, does not seem to apply to intentional deprivation done under

shield of appearance of duty. Congress did not abrogate immunity, but the Fourteenth Amendment infers it preserved judicial immunity solely for a judge intending to discern the will of the law. Otherwise, the immunity doctrines would be in conflict with that Amendment. If the illicit will of a state judge were immune to civil liability, then that can be executed under a superficial appearance of duty, such as by intentional misuse of KRCP 54.02 language for illicit, injurious deprivation. Immunity for that would not serve vested rights, the public interest or trust in our justice system. And certainly it would not enforce government by laws and not men. Petitioner is aware of the criminal analog 18 USC §242 as an alternative to 42 USC §1983. But, it is nominal and does nothing to restore a lifelong effort. It is not a remedy for substantial injury, intentionally done, under color of law. Littleton v. Berbling (7th Cir. 1972) 468 F 2d 389 at 413 (quoting Breitel), puts remedy by criminal prosecution factually and stated:

> " 'Such remedies are merely nominal. The criminal sanctions can rarely be invoked to control the errant police officer, the errant prosecutor, and never the oppressive judge.' Breitel, Controls in Criminal Law Enforcement, 27 U.Chi.L.Rev. 427, 434 (1960)".

xiii. One reason for granting Certiorari is to advance public trust in the justice system. Inherently, the type of injury caused to Petitioner concerns all citizens, for it can occur only by intentional misuse of rules and laws, and withholding of remedies. Timely relief is of the essence in a trial court. All that needed to be done (in Petitioner's case) was to enforce a contracted May 18, 1994 trial date. The contract was a separation agreement, enforced for cash terms but refused as to trial date and all other terms. Kentucky statutes forbid that and state:

> "its terms shall be set forth verbatim or incorporated by reference in the decree of dissolution or legal separation and the parties shall be ordered to perform them"; KRS 403.180(4)(a).

This law is continued at KRS 403.180(5), which states:

(terms . .) "are enforceable by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms."

xiv. The trial date terms were not enforced verbatim as required by law. Failing that, all that needed to be done was to grant a protective and restraining order to restore sales and adjust equity division for the 1994 (and relatively small) $54,000.00 loss of sales. The public knows it has fair laws, but needs to know that adequate redress exists for injury that arises from deprivation of equal protection and access to federal and state laws. As put in Littleton v. Berbling at 413 (quoting Breitel), criminal sanctions can never be invoked to control an oppressive judge. An opinion as to civil liability for willful judicial oppression could have a substantial corrective effect on judges refusing to grant timely access to injury claims in matters of equity adjudication. Such an opinion would be a preventative measure and in the public interest. There are citizens who are losing trust in state court justice, for reasons analogous to those stated in this Petition. State judges should be free to act, but not to dismiss and intentionally avoid legitimate questions raised about federal deprivation. A state judge is required to discern the course prescribed by law. Orders A, B, C1 - C3, D2 - D3, and E4 infer no will to determine that course. Petitioner respectfully suggests that the issues, facts and authorities, set forth within, show cause for an opinion as to the reach of judicial immunity, where abuse is the basis for injury, to wit:

> where deprivation involves a state trial judge's will to withhold timely equal treatment, due process and duty required by rules of court, whereby that willed deprivation causes substantial injury and shields joint tortfeasors by orders, misusing language of the form set forth in FRCP 54(b), to obstruct redress and remedy; and where appellate state court(s), under these circumstances, refuse to take manifestly unconstitutional orders on appeal to discern the consequences of remanding claims or the course prescribed by law.

xv. This is about intentional obstruction of basic vested rights. The orders in this case show that KRCP 54.02 lan-

guage was abused as to intent of that rule, and the trial records confirm that judiciary willed obstruction, to cover up the circumstances that went before. This included breach of contract, refusal of relief to restore business sales, and other matters of record. These circumstances make C1 and C2 more than orders of final force and effect. They make these orders willed deprivation, cover up, and intend to continue injury. The public would benefit from an opinion as to the constitutional use of rules, but extending that, as to civil liability for intentionally withholding access to vested rights, should make the issue more substantial. The value is in interpreting rights for a party's timely access to remedies that, when delayed, have grave injurious consequences. This fact seems not to be universally held by state court judges, yet it is vital for justice in time-dependent matters. On injury from intentional obstruction to timely access, a state court of appeals should not dismiss action to review deprivation of Fourteenth Amendment rights and orders showing acts outside jurisdiction. KRCP 54.02 language is not the supreme law of the land. The public should be able to rely on redress, where substantial injury comes from illicit judicial edicts that manifestly deprive basic federal rights. This Petition shows cause for redress in federal court and that dismissal of appeal in Kentucky remands to Circuit Court, federal questions that are inappropriate for action there.

VI. CONCLUSION

WHEREFORE, Petitioner prays that Writ of Certiorari issue from this Honorable Court to review orders entered in the case of Frank B. Carabello v. Sharon R. Carabello, et al. In the event the Petition is granted, Petitioner prays the August 27, 1997 Order of the Supreme Court of Kentucky will be reversed on a decision that C1 - C2 orders are acts outside jurisdiction, and prays for remand to that Court to (i.) void C1 - C3 orders, and (ii.) compel restoration or surety by opposing parties on assets released by C2, and (iii.) direct that Court to allow a proper appeal, to make a record on merits as to remand in C1 §1 now being a moot issue from

Circuit Court having made erroneous findings, suppressed evidence, deprived property and rights, and abused discretion. The Kentucky appeal is necessary, so Petitioner can proceed with action in federal district court, for redress against joint tortfeasors. Thus, in the event Certiorari is granted, Petitioner also prays for an opinion as to the reach of judicial immunity, in regard to the concerns for civil liability and redress, as introduced on page 10 § ix, supra, and expounded thereafter.

This petition respectfully submitted

the 15th day of October, 1997, By:

Frank B. Carabello

FRANK B. CARABELLO, PRO SE
2855 WILSON SCHOOL COURT
SINKING SPRING, PA 19608
(610) 670-5662

APPENDIX SECTIONS: A - E

APPENDICES TO PETITION FOR CERTIORARI

Supreme Court of Kentucky

97-SC-150-D
(96-CA-2299-MR)

FRANK B. CARABELLO — MOVANT

V.

BOONE CIRCUIT COURT
93-CI-561

SHARON R. CARBELLO, ET AL. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED August 27, 1997.

Robert F. Stephens
Chief Justice

APPENDIX "A": Note: Caption, date and signature captured in document by computer scan of official document. Text was typeset verbatim from official document to fit formatting requirements.

Commonwealth Of Kentucky

Court Of Appeals

96-CA-2299-MR

FRANK B. CARABELLO APPELLANT

V. APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 93-CI-561

SHARON R. CARABELLO, ET AL. APPELLEES

* * * * * * * * * * *

ORDER DISMISSING APPEAL

BEFORE: BUCKINGHAM, COMBS and KNOPF, Judges.

By order entered December 12, 1996, this Court required appellant to show cause why this appeal should not be dismissed as having been taken from nonfinal, nonappealable orders. Having considered appellant's response thereto, the Court has determined that appellant has not shown cause.

This appeal is taken from an order entered by the Boone Circuit Court on July 12, 1996, which reserves the disposition of appellant's motion to designate as a jury action additional claims raised in his amended petition and to suspend execution of all judgments pending a jury verdict on damages. The appeal is also taken from an order entered by

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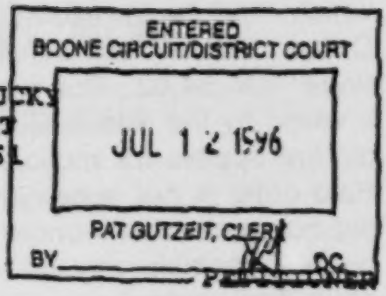
APPENDIX "B": Note: Caption, date and signature captured in document by computer scan of official document. Text was typeset verbatim from official document to fit formatting requirements.

the Boone Circuit Court on July 23, 1996, releasing funds which had been frozen under a Temporary Restraining Order. Neither order includes the requisite finality recitals under CR 54.02. The appeal is also taken from an order entered by the Boone Circuit Court on July 23, 1996, which denies appellant's motion for a new trial under CR 59.01. Said order is not appealable in and of itself since appellant did not seek review under CR 60.02. The order could have been appealable only if it had denied a motion to set aside a prior final judgment. However, the Court has already concluded that the order of July 12, 1996, is not a final decision.

Therefore, it is ORDERED, on the Court's own motion, that this appeal be DISMISSED as having been taken from interlocutory orders.

ENTERED: FEB 11 1997

JUDGE, COURT OF APPEALS



COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 93-CI-00561

IN RE: THE MARRIAGE OF

FRANK B. CARABELLO PETITIONER
v.
SHARON CARABELLO RESPONDENT

ORDER

** *** **

This matter having come before the Court and the Court hearing the pleadings, and having heard argument from the parties on motions and objections related to the Report of the Special Commissioner recommended August 24, 1995, the Court order as follows:

1. The finding overruling the Petitioner's Motion to Designate Action as a Jury Action and Suspend Execution of All Judgments Pending Verdict of Jury on Damages contained in Paragraph 3 of the Order entered February 16, 1996, is stricken and said matter is remanded to the Docket for further proceedings.

2. The equity in the Mitsubishi automobile listed as an asset at $10,000.00 in the Joint Pre-Trial Statement represents a duplication of assets as the same amount was included in the designated marital savings and checking accounts. To adjust for this duplication, $10,000.00 shall be deducted from the award to the Respondent Sharon Carabello.

APPENDIX "C1": Note: Caption, date and signatures, notice and certificate were captured in document by computer scan of official document. Text was typeset verbatim from official document to fit formatting requirements.

3. All other objections to the Recommended Order are hereby overruled and said recommendations are incorporated herein and approved and are the Order of this Court.

Joseph F. Bamberger, Judge

HAVE SEEN:

Michael K. Ruberg
Attorney for Petitioner
B:\DOCS\CARABELO.PLE\ORDER.613

Rebecca K. Kaye
Attorney for Respondent

NOTICE

All parties will take notice that this order was entered in office of the Boone District/Circuit Clerk on the 12 day of July, 1996.

PAT GUTZEIT
BOONE DISTRICT/CIRCUIT COURT
_____ D.C.

CERTIFICATE

I, PAT GUTZEIT, Clerk of the Boone District/Circuit Court, hereby certify that I have mailed a copy of the foregoing order and notice to all parties hereto at their last known addresses or their counsel of record this 12 day of July, 1996.

PAT GUTZEIT
BOONE DISTRICT/CIRCUIT COURT
_____ D C

APPENDIX "C1"- page 2. Note: Attorney Ruberg co-signed this order against client's will and withdrew as counsel on July 12, 1996.

COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
FILE NO. 93-CI-00561

ENTERED
7-23-96
PAT GUTZEIT, CLERK
BOONE CIRCUIT/DISTRICT COURTS
BY: _____ D.C.

IN RE: THE MARRIAGE OF:

FRANK B. CARABELLO, PETITIONER

and

SHARON R. CARABELLO, RESPONDENT

****

ORDER

****

The Court, having ruled on Petitioner's Objections and entered an Order on July 12,1996, and upon hearing and the motion of the Respondent for release of funds, hereby orders the release of any and all accounts that were frozen, escrowed or accounts under a temporary restraining order from this Court (as specifically listed below) and\or subject to the continuing jurisdiction of this Court by Order entered on , (attached hereto) be released to Respondent Sharon Carabello on presentation of a certified copy of ties Order to the respective institution.

The accounts that are covered by this Order shall included the escrow at Hebron Bank containing the proceeds from the sale of the real property, Liberty Nation Bank (90000449), Star Bank, Florence Deposit Bank, Central Trust of Norther Kentucky, Kentucky Federal Savings and Loan, Dean Whitter Reynolds, Inc., American State Bank of Indiana, 5/3rd Bank of Northern Kentucky and 5/3rd Bank of Lawrenceberg, Indiana.

J. J. Bamberger

HON. JUDGE BAMBERGER

APPENDIX "C2": Note: Caption, date and signature captured in document by computer scan of official document. Text was typeset verbatim from official document to fit formatting requirements.

COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
FILE NO. 93-CI-00561

ENTERED
12396
PETITIONER'S
PROVIDED TO COURT MEMBERS
BY
20 25

IN RE: THE MARRIAGE OF

FRANK B. CARABELLO PETITIONER

V.

SHARON R. CARABELLO RESPONDENT

****

ORDER

****

Upon hearing and memoranda filed by the parties, the Court hereby overrules the **Petitioner's Motion for a Mistrial and to Strike Prior Orders and Motion for a New Trial, Pursuant to CR 59.01**, said matters having been raised and adjudicated in this proceeding.

Hon. Judge Bamberger

memodrft.wp6 1.

APPENDIX "C3": Note: Court, entry date and signature captured in C3 by computer scan of official copy of the order. Text was typeset verbatim from that copy to fit formatting requirements.

FILED

FEB 24 1997

CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 97-SC-150-D

FRANK B. CARABELLO — APPELLANT-MOVANT

V.

In Re: 2/11/97 Order Entered by
Hon. Sara Combs, Judge,
Ky. Court of Appeals, No. 96-CA-2299-MR
and 96-SC-001128 per prior CR 65.09 motion

SHARON R. CARABELLO
HON. REBECCA K. KAYE — APPELLEE-RESPONDENT

MOTION FOR DISCRETIONARY REVIEW, PURSUANT TO CR 76.20

Frank B. Carabello moves for review of the referenced order (attached) because of matters before this Court (Re: 96-SC-001128) on prior CR 65.09 motion and for special reasons, as follows:

1. At issue is whether CR 54.02 has absolute power to obstruct enforcement of other rules, applicable laws, and the equal protection and due process clause of the 14th Amendment to The U. S. Constitution. Review (per CR

APPENDIX "D1": Note: File date and signature captured in document by computer scan of official document. Text was typeset verbatim from official document to fit formatting requirements.

76.20) is needed to resolve questions of procedure, constitutional rights, and whether missing CR 54.02 language shall bar appeal in Kentucky regardless of prior harmful abuse and judicial misconduct. Movant has cause for appeal. His lifetime effort was destroyed at the hands of judicial misconduct. His losses exceed a million dollars in lost earnings and destruction of estate. Abuse divested his property and rights and irreparably destroyed his lifetime effort. His every motion was defeated in the trial court by deception and tabling to obstruct the merits. Requests for inclusion of CR 54.02 final language and for relief under CR 60.02 were made, and, repeatedly, due relief and every effort made by Movant was defeated by abuse, including delay, deception, surprise and other misconduct to disadvantage him.

2. The Court of Appeals dismissed Movant's response (attached) showing irreparable harm, force, effect, cover up and divestiture of constitutional rights, and cited missing language as bar to appeal. Under color of maliciously withheld language, a CR 54.02 bar is means to divest federal rights. The Court of Appeals held orders were non-final yet they are enforceable and have fatal force, because they divest property and rights (which can never be restored if appeal is delayed). Prior harm and divested rights are swept away by dismissal and Movant is laid open to more abuse. The trial court orders empowered action in Hamilton County Ohio (Court of Common Pleas No. A9503899) on pre-marital property (involving daughters from a prior marriage). He needs appeal to stop unjust action in Ohio and to reverse divestiture of pre-marital IRA, other property and constitutional rights (Re: 96-SC-001128 motion previously filed). The orders appealed are interlocutory in appearance only. They are enforceable and conceal abusive irreparable effect "to divest property and rights without due process". They omit CR 54.02 language to obstruct compliance with CR 18.02, 38.01, 39.01 and CR 52, Kentucky statutes and The U. S. Constitution. They serve fraud and impair ability to

litigate unresolved claims. There is absolutely no reason to return to the trial court, for justice can not be had there. The orders must be appealable whether or not they resolve all claims or contain CR 54.02 language. Mandates (commanded by "shall") are not unique to CR 54.02. They are present in aforementioned rules of procedure violated by the trial court. Appeal will prove need to revise procedure. It is contended that absolute requirement for CR 54.02 language lays a party open to malicious judicial abuse, including harm, obstruction and cover up. Dismissal under CR 54.02 on **orders delaying final adjudication of damages but empowering divestiture of estate to defeat unresolved claims** (.. emphasis added) serve to defeat willingness, reason and/or ability to continue litigation. Movant contends public interest can not be served by absolute application of certain civil rules and that absolute application of CR 54.02 violates (intended) procedure, public interest and The U. S. Constitution.

3. The underlying questions are how much abuse at the hands of judicial misconduct is enough and what civil recourse is appropriate. Movant contends abuse and substantial harm must make appeal appropriate. The trial court has withheld and wasted the power to make Movant whole. Destruction of a pre-marital business (the source of Movant's livelihood) was empowered by abusive trial court acts and by failure of Court of Appeals to provide relief per prior petition for mandamus (95-CA-348-OA). Now withheld CR 54.02 language is being used to delay and prevent proof of prior misconduct while injustice continues to expand (on the force of trial court orders). Movant's prior motion (per CR 65.09) and this motion should be sustained to prevent further harm.

4. Movant can not withstand or risk further harm. It will take an appeal to prove why but a brief summary may help and follows:

a. The trial court unjustly encumbered Movant with barriers to litigation and a debt (hereinafter "debt") from creative ac-

counting with out of date 1992 estate values. Respondents severely depleted the 1992 values by damages caused in 1994 (which were empowered by delays and divested rights). The original divorce petition was amended for damages with demand for a jury trial, but that was tabled (due process denied and damages left to expand) while unjust debt was created through misconduct. Then, the debt was used to release estate remains (without due process) for Sharon R. Carabello to conceal. That defeats Kentucky law, rules of civil procedure, and irreparably divests Movant's rights and property.

b. Movant does not have the willingness, ability or reason to continue to litigate the debt, the release of estate, the divestiture of his rights and related matters in the trial court. Movant spent 1994-96 trying to obtain accountability for his damages through his trial court lawyers (at substantial expense) and they acquiesced to judicial misconduct (including breach of a contract to resolve matters) and withheld advocacy for fraud.

c. Cause for appeal includes fraud and trial court abuse that has concealed it, harm and divested constitutional rights. Under the circumstances, dismissal would make withheld CR 54.02 language absolute means to cover up misconduct, fraud and divested rights.

5. Rule 54.02 is means for conserving judicial energy and preventing needless appeals. It can not be "absolute" means to impair appeal caused by misconduct, fraud and divested rights. Absolute application of CR 54.02 violates The U. S. Constitutional mandate for equal treatment and due process, in part, because withholding language to bar review bestows unconstitutional "kingly" power on a lower court to impair relief on orders that divest rights. Regardless of CR 54.02 language, substantial harm and injustice must be "ripe for appeal" when property and due process are divested. Petition for mandamus to stop injustice early in 1995 was denied (95-CA-348-OA) and that allowed abuse to expand

regardless of unresolved claims. Enough is enough. The merits and appeal should not be dismissed.

6. Regarding clerical compliance with CR 76.20, Movant states he has no petition for rehearing or reconsideration motion pending in the appellate court and, to his knowledge, nor does any other party. No supersedes bond has been executed. Photocopies of the record are ***I.*** attached dismissal order and response (on cause for not dismissing), and previously filed ***II.*** 12-12-96 order from the Court of Appeals and previously filed ***III.*** notice of appeal and three interrelated orders from the trial court. Movant states that none of these show cause for dismissal. Ten copies of the previously filed materials (see ***II.*** and ***III.*** above) were filed in this Court on 12-18-96 (Re: 96-SC-001128), and the Clerk has been asked to apply them for consideration of this motion. However, the available photocopies can prove very little, as appeal is required means for proof in these matters. Addresses of the parties are shown in the following affidavit and in the record (per notice of appeal).

7. In summary, there are compelling reasons and justice demands that the appeal go forward. The most important are judicial duty to uphold constitutional rights and to serve the public. Delaying claims (for years) and then withholding CR 54.02 language to conceal the harm and misconduct is deception, misuse of civil procedure and a violation of public trust. Thus, the dismissal of appeal should be reversed.

WHEREFORE, the Movant respectfully asks that discretionary review be granted, that his prior motion (per 65.09) be sustained and that Order entered February 11, 1997 (by the Court of Appeals) be reversed and remanded with instructions to conclude CR 76.03 procedures and sustain appeal so that the substantial harm done in the trial court can be reviewed without further delay. In the event these requests are denied, Movant asks for waiver of judicial immunity to civil liability so he is better able to pursue

damages in federal court. As injustice has negated reason to continue litigation in the abusive trial court, that is not a reasonable option.

Respectfully submitted:

Frank B. Carabello

FRANK B. CARABELLO, PRO SE
2250 LINCOLN AVENUE
WEST LAWN, PA 19609
610/670-5662

AFFIDAVIT TO VERIFY FACTS IN FOREGOING MOTION AND SERVICE

I, Frank B. Carabello, state that the facts in the foregoing motion are true and correct, and hereby verify that true and correct copies of the motion were served by regular U.S. mail on the 20th day of February, 1997 on the Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229 and on the Appellees-Respondents, Sharon R. Carabello and Honorable Rebecca K. Kaye, at The Kroger Building Suite 2525, 1014 Vine Street, Cincinnati, Ohio 45202-1144, and that the record on motion was sent to them previously, except for the 2/11/97 order (served on Respondents with this motion).

Frank B. Carabello
FRANK B. CARABELLO

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF Berks

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me by said FRANK B. CARABELLO this the 20 day of February, 1997.

Sherry Lin Reisch
NOTARY PUBLIC
My Commission Expires: _____

NOTARIAL SEAL
Sherry Lin Reisch, Notary Public
Sinking Spring Boro., Berks County
My Commission Expires Dec. 25, 2000
Member, Pennsylvania Association of Notaries

Supreme Court of Kentucky

96-SC-1128-I

FRANK B. CARABELLO — APPELLANT

ON REVIEW FROM THE COURT OF APPEALS
V. 96-CA-2299
BOONE CIRCUIT COURT NO. 93-CI-561

SHARON R. CARABELLO
REBECCA K. KAYE — APPELLEES

ORDER DENYING INTERLOCUTORY RELIEF
PURSUANT TO CR 65.09

The Appellant having moved for interlocutory relief pursuant to CR 65.09 and the Court being full advised in the premises, ORDERS that the motion be, and hereby is, DENIED. The Appellant has failed to demonstrate any extraordinary cause in support of the motion.

All concur.

ENTERED: February 27th, 1997.

Robert F. Stephens
Chief Justice

APPENDIX "D2": Note: Caption, date and signature captured in document by computer scan of official document. Text was typeset verbatim from official document to fit formatting requirements.

Commonwealth Of Kentucky

Court Of Appeals

NO. 96-CA-2299-MR

FRANK B. CARABELLO — APPELLANT

V. — APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 93-CI-0561

SHARON R. CARABELLO; REBECCA K. KAYE — APPELLEES

* * * *

ORDER

BEFORE: EMBERTON, MILLER AND SCHRODER, JUDGES.

The Court has considered appellant's motion for interlocutory relief pursuant to CR 65.08 to which appellees did not respond and, being otherwise sufficiently advised, ORDERS the motion be DENIED. Appellant seeks an order from this Court reversing the release of funds which had been frozen under a Temporary Restraining order and restoring said funds or, in the alternative, requiring appellee, Sharon Carabello, to post a $50,000.00 bond with surety. Appellant contends the release of the funds will cause him irreparable harm because it depletes resources necessary to recover damages in yet unresolved claims. However, it appears to the Court that the funds in question are currently protected by a bankruptcy stay and therefore, without expressing any opinion as to the merits of the claims raised in this appeal, we hold that interlocutory relief is not appropriate.

Further, upon initial screening of the record of this

APPENDIX "D3": Note: Part of caption, date and signature were captured in document by computer scan of official document. Text was typeset verbatim from official document to fit formatting requirements.

appeal, it appears that the notice of appeal designates orders which are interlocutory. The appeal is taken from an order entered by the Boone Circuit Court on July 12, 1996, which reserves the disposition of appellant's motion to designate the action as a jury action and to suspend execution of all judgments pending a jury verdict on damages. The order does not adjudicate all claims in the action but does not include the requisite finality recitals under CR 54.02. The appeal is also taken from an order entered by the Boone Circuit Court on July 23, 1996, releasing the aforementioned funds. Likewise, the order does not include CR 54.02 language.

Appellant is hereby given twenty (20) days from the date of entry of this order in which to SHOW CAUSE, if any there be, why appeal number 96-CA-2299-MR should not be dismissed as having been taken from nonfinal, non-appealable orders. Appellant shall file one (1) original and four (4) copies of his response.

ENTERED: DEC 12 1996

Wil Schroder
JUDGE, COURT OF APPEALS

APPENDIX "D3".

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

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OCT 4 - 1996
COURT OF APPEALS

FILE NO. 96-CA-002299

FRANK B. CARABELLO — Appellant

V.

Appeal From Boone Circuit Court
Hon. Joseph F. Bamberger, Judge
Civil Action No. 93-CI-00561

SHARON R. CARABELLO — Appellee
HON. REBECCA K. KAYE — "

APPELLANT'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF EX PARTE MOTION FOR EMERGENCY RELIEF, PER CR 65.08

A. REFERENCE TO THE APPENDED RECORDS

1. Reference to the record herein is by numerical superscripts which refer to exhibit numbers and the exhibits appended hereto, (see list in memorandum at pages 6-7).

B. STATEMENT OF POINTS AND AUTHORITIES

1. Appellant contends withdrawal of counsel was without good cause or provision for substitute counsel, as is required per Rule 4D(1,2) of Uniform Local Civil Rules, the Commonwealth of Kentucky, Boone, Campbell, Gallatin & Kenton Counties, and that posed irreparable harm and caused him to file bankruptcy petition in an attempt to stay irreparable harm from release of funds, see memorandum at pages 3-4.

2. Appellant contends 7/23/96 Order[6] commanding banks to released funds, disregards unresolved damage

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APPENDIX "E1": Note: File date seal captured in document by computer scan of filed copy. Remainder of document was typeset verbatim from original document to fit formatting requirements.

claims, such that release of funds does not accord with the relative rights of the parties (CR 18.02), and contends that release violates the due process clause of the fourteenth amendment to the U. S. Constitution, Carey v. Piphus (1978), 435 US 247, 55 L Ed 2d 252, 98 S Ct. 1042, see memorandum at page 4.

3. Appellant contends that demand[3] for a jury trial was mandatory cause to stay release of funds until after a jury determination (CR 18.02, 38.01, 39.01, Dairy Queen Inc v. Wood, 369 US. 469, 476, 82 S.Ct. 894, 899, 8 L. Ed. 2d 44, 50 (1962), in Dobbs - Law of Remedies, (1993) Ed. 2d, § 6.10(5), Vol. 2, at 225), see memorandum at pages 4-5.

4. Appellant contends Appellees cashing pre-marital IRA[9] (Dean Whitter Reynolds Account #344 038686) restored to him in findings[5] adopted by Order[4] of 7/12/96 is unlawful (KRS 403.190) and contends lack of specificity in releasing Order[6] violated CR 52.01, Klop v. Klop, Ky. App., 763 S.W. 2d 663 (1989), at 665, and CR 1, KRS 403.130(1), Hollon v. Hollon, Ky., 623 S.W. 2d 898 (1981), at 899. Appellant also contends error per CR 65, in 10/13/94 Order[7] restraining accounts, see memorandum at page 5.

C. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

1. During pendency in the trial court, there were damages to estate and earnings. Petition was amended[2] and demand[3] was made for jury. The trial court docketed jury action per §1 of 7/12/96 Order[4], only after seventeen months of delay and substantial legal fees to cause that assignment. The assignment was little more than superficial acknowledgment of constitutional right to jury, because it did not abate domestic relief until jury first resolved damage to estate. Thus, 7/12/96 Order[4] adopted 8/24/95 findings[5] prior to a jury trial on damages and the damages claims remain unresolved.

2. Order of 7/23/96 commanded banks[7] to release funds and divested substantial rights. The funds released are most all of the remains of the estate, so that release

removed majority of remains of estate from the power of the court. Wasting the remains would defeat reason to litigate unresolved claims. No surety provision was made. Release Order was used to liquidate escrow[8] and Appellant's pre-marital IRA[9] and presumably all other accounts[10], although Appellant has not confirmed action on institutions other than Hebron Deposit Bank and Dean Whitter Reynolds. Both institutions verified that the funds were transferred to Sharon Carabello, and one[8] provided a letter with records and the other[9] provided statements. Over $41,000.00 was taken from accounts at the two institutions and Appellant is unclear as to what was taken from other institutions. The account at Dean Whitter Reynolds was Appellants pre-marital IRA account, as shown by the findings[5] adopted by 7/12/96 Order[4].

3. Order commanding release was aided by withdrawal of counsel. Albeit Order[11] on withdrawal was entered 8/14/96, motion[15] for it coincided with and aided release. Entry of release Order on the same date as the hearing, just eleven days after 7/12/96 Order and coinciding with withdrawal of counsel, constitutes swift injustice to defeat unresolved claims. Counsel knew of motion[16] for release and timed motion[15] to withdraw to aid release and disadvantage Appellant. The letters[12,13,14] exchanged between Appellant and counsel show that he did not ask or expect Hon. David Sloan to withdraw, as also explained in the first three pages of the memorandum[17] submitted to the trial court on 7/18/96. Withdrawal of counsel infers corrupt intent to defeat Appellant's willingness to continue litigation. The procedural history infers withdrawal was acquiescence of counsel to the prejudice of the trial court. The circumstances (including history to be presented later at time of appeal) suggest that the trial judge was not impartial and fairness was denied throughout pendency. Thus, notice of intent to withdraw sent a message to Appellant, that upon hearing of motion[16] the trial judge was likely to grant release of funds immediately. Thus, there was the threat of

immediate and irreparable harm. Four days prior to release, Appellant sought the aid of Hon. George M. Lutz, attorney in Reading, Pennsylvania to petition for bankruptcy as the only expedient means available to prevent the harm that appeared to be imminent and that would bankrupt him if the trial court Orders[4,6] were not reversed. Notice[18] of that was sent to Appellee, Sharon Carabello, through her counsel and both ignored it. Notice[19] was sent to the clerk of the trial court about nine days later but the trial court has not applied it retroactively to July 19, 1996 to reverse release on it's own. Although Hon. George M. Lutz inadvertently failed to send notice to the clerk on July 19, 1996 as intended, the Appellees had the notice and chose to break the law. The trial court judge and Appellees both knew of unresolved damage claims[2,4] (pending for over seventeen months at that time) and chose to defeat claims and jury rights by release of funds without surety.

4. In summary, claims on damages were disregarded, then remanded to trial court docket just before unconditional release of funds. Despite good cause to preserve funds pending jury resolution of damages, Order for release was entered that showed clear prejudice and divested rights. Unconditional release of funds defeats ability and reason to litigate unresolved damage claims. The facts prove the release is manifest injustice.

D. ARGUMENT

1. Appellant raises the issue improper withdrawal of counsel to disadvantage him, and contends counsel withdrew without good cause or provision for substitute counsel, as required per Rule 4D(1,2) of Uniform Local Civil Rules, Commonwealth of Kentucky Boone, Campbell, Gallatin & Kenton Counties, and that posed irreparable harm. Counsel procrastinated for five months prior to tendering the 7/12/96 Order[4] (which counsel controlled by preparation per off-the-record directive from the trial judge). Appellant contends that counsel procrastinated to provoke circum-

stances for withdrawal. In Memorandum[17] filed 7/18/96 for hearing of 7/23/96, Appellant argued cause for withdrawal did not exist. Counsel was fully aware of motion to release and being aware of it, he timed motion[15] to withdraw to coincide with the motion[16] to release funds. Appellant states that these circumstances caused him to file bankruptcy, as means to prevent irreparable harm and preserve funds and preserve reason to litigate unresolved damage claims.

2. Appellant raises the issue of miscarriage of justice in the Order[6] for release of funds from a damaged estate, where damages remain unresolved[2], and contends determination as to value of the estate before and after damages must be known before such an Order can accord with the relative rights of the parties. (CR 18.02).

> i. Whenever a claim is . . . . cognizable only after another has been prosecuted to a conclusion, . . . the court shall grant relief in that action only in accordance with the relative substantive rights of the parties, Kentucky Rules of Civil Procedure, Rule 18.02.

Claims joined by amended petition[2] substantially changed the nature of the case. Demand[3] for jury was timely made but timely access was neglected, despite claims that had made domestic relief unjust until jury first resolved offset for damages. There was but one estate available as to all claims, on which claims are unresolved, such that conveyance of remains of estate to Appellee, by releasing Order[6], is contrary to CR 18.02. Execution of Orders on domestic claims must subordinate to damage claims on estate from which all judgments must be paid (CR 18.02). Denying access to jury before release of estate divests ability and reason to litigate damages. Thus, a judge should not divide an estate while postponing access to jury. Clearly, that is an abuse of discretion and not in accord with the relative rights of the parties. Appellant contends unconditional release of funds is irreparable harm, as these

funds are the major share of the estate that remain per damages. Appellant has been unemployed for years as a result of damage to his business. He contends that release of estate negates reason for remand[4] of claims to docket, and that constitutes misuse of judicial office to defeat right to due process. Thus, release Order violates the due process clause of the fourteenth amendment to the U. S. Constitution, Carey v. Piphus (1978), 435 US 247, 55 L Ed 2d 252, 98 S Ct. 1042, in that, a jury right withheld until defeated by releasing funds is no right at all.

3. Appellant raises the issues of abuse of discretion, prejudice and interference with trial rights, and contends that demand[3] for a jury trial is mandatory cause to stay release of funds on equity division until after a jury determination (CR 38.01, 39.01). Although this question appears to be one of first instance in Kentucky divorces, authorities (Dairy Queen Inc v. Wood, 369 US. 469, 476, 82 S.Ct. 894, 899, 8 L. Ed. 2d 44, 50 (1962), in Dobbs - Law of Remedies, (1993) Ed. 2d, § 6.10(5), Vol. 2, at 225) have held that a jury trial must be given priority in cases involving both issues of law and issues of equity. These authorities have decided as follows:

> i. If the complaint requests a money judgment . . . it is unquestionably legal, Dairy Queen Inc v. Wood, 369 US. 469, 476, 82 S.Ct. 894, 899, 8 L. Ed. 2d 44, 50 (1962), and if . . . two issues, one legal and one equitable, ...a jury trial is required as to both, in Dobbs - Law of Remedies, (1993) Ed. 2d, § 6.10(5), Vol. 2, at 225.

Withdrawal and release motions[15,16] set just eleven days after 7/12/96 Order[4] shows intent to defeat claims for money judgment. The Court, Counsel and Appellees all knew of unresolved claims and of reason to delay. The Orders[4,6] show prejudice and divestiture of right to jury (CR 38.01, 39.01). The right was not acknowledged by the trial court until § 1 of the 7/12/96 Order[4], some seventeen months after demand[3]. Prior to that the trial court disregarded damages

and any related issue. The release Order[6] depletes resources necessary to recover damages in a jury trial and thus divests the right to jury by negating reason to access CR 38.01 rights. Therefore, the release of funds is unlawful deprivation of rights under color of the law.

4. Appellant raises the issue of Appellee cashing accounts not assigned to her in findings adopted by Order of 7/12/96, and contends that is unlawful (KRS 403.190), because she used 7/23/96 release Order to cash pre-marital IRA[9] (Dean Whitter Reynolds Account #344 038686) restored to him[4,5]. No findings and conclusions were made to reverse said restoration. Clearly, neglect of specificity as to accounts in release Order[6] empowered Appellee to defeat pre-marital restoration. Appellant contends specificity is required by CR 52.01 per Klop v. Klop, Ky. App., 763 S.W. 2d 663 (1989), at 665 and by CR 1, KRS 403.130(1) per Hollon v. Hollon, Ky., 623 S.W. 2d 898 (1981), at 899. Appellant also contends error per CR 65, in 10/13/94 Order[7] restraining accounts, at hearing on the defects. That error is set out in the motion[20] attached.

E. CONCLUSION

1. The release Order[6] was executed with negligent disregard of damage claims and demand for jury. Appellant concludes that the Order shows injustice, prejudice and harm contrary to the purpose of Chapter 403, KRS 403.110 (2,3). Also, the record[4] shows neglect of demand[3] for a jury. Miscarriage of justice and interference with constitutional rights are manifestly evident. Motion to release was misconduct to defeat unresolved claims. The release Order[6] divests rights on substantial claims by unconditional release of funds without surety. Bank statements[8,9] show Appellee cashed accounts on or about 7/23/96, ignoring a bankruptcy stay to secure them. A temporary bankruptcy stipulation may have secured most of the funds but exactly what is left is unclear at this time. Without access to most or all of the funds, there is no reason to litigate unresolved claims. Thus, release immediately should be reversed with instructions to

restore funds or, in the alternative, Appellee should be required to provide surety bond in the amount of $50,000.00, per cash totals shown in Exhibit[10] plus $1,500.00 for legal expenses incurred as a result of the release.

2. The release of funds is contrary to law (CR 18.02, 52.01 and KRS 403.190) and, in effect, would divest jury trial rights (CR 38.01, 39.01) by removing reason to litigate damage claims. Execution of Orders on domestic claims must subordinate to damages on estate from which all judgments must be paid (CR 18.01). It is misfeasance to grant release based on equity claims before a jury determines damages and temporal changes in value of estate (CR 38.01). Thus, the release Order contended herein is a clear miscarriage of justice (CR 18.02, 38.01, 39.01 and 52.01) and divest rights provided by the fourteenth amendment of the Constitution of the United States. At the very least, surety is required for releasing accounts to assure remains of estate can not be wasted prior to a jury trial.

3. Appellant was forced, by misrepresentation, to fend for himself and file bankruptcy as means to preserve funds. Substantial harm already has resulted from release, in that, substantial legal and other expenses were incurred and apparently some funds have been wasted. If remedy is not soon made available, Appellant will have no resources, ability or reason to litigate unresolved claims.

4. Wherefore, Appellant concludes that there is good cause for his emergency CR 65.08 motion to be sustained and offers the exhibits identified below, and attached hereto, in support of his cause.

F. LIST OF ATTACHED EXHIBITS

Brief ref. no.	Exhibit code..	Description and/or Purpose of Exhibit
1.	EX #1	Notice of Appeal filed 8/9/96.
2.	EX #2	Amended petition filed 3/6/96‡.
3.	EX #3	Demand for jury trial filed 2/13/96‡.
4.	EX #4	Final Order entered 7/12/96.

APPENDIX "E1"- page 8; /96‡ incorrect- should be /95.

F. LIST OF ATTACHED EXHIBITS(continued)

Brief ref. no.	Exhibit code..	Description and/or Purpose of Exhibit
5.	EX #5	Findings on domestic claims filed 8/24/95 adopted by EX #4 above.
6.	EX #6	Order entered 7/23/96 commanding banks to release funds.
7.	EX #7	Restraining Orders (10/13/94 & 3/1/95), listing banks subject to EX #6.
8.	EX #8	Letter enclosing copy of EX #6 and records showing funds transferred out of account at Hebron Deposit Bank.
9.	EX #9	Dean Whitter Reynolds statements showing funds transferred out of Appellant's pre-marital IRA account.
10.	EX #10	Listing of banks and funds subject to release. Funds in each per information in Appellant's records. (Some records may be out of date, but not those for EX #8 and EX #9 above.)
11.	EX #11	Order entered 8/14/96 granting withdrawal of counsel.
12.	EX #12	July 7 letter to Hon David Sloan (which he refers to as July 7, 1996 letter).
13.	EX #13	July 9, 1996 letter to Hon. David Sloan (written with no knowledge of his intent to withdraw and with belief that he was working on CR 59 motion). Appellant believes he withdrew to evade contending the motion.
14.	EX #14	Letter from Hon. David Sloan which misrepresents facts as to need for new counsel (as inferred from EX #12 and EX #13 above showing continued reliance on him and inability to contact

F. LIST OF ATTACHED EXHIBITS(continued)

Brief ref. no.	Exhibit code..	Description and/or Purpose of Exhibit
		him by phone).
15.	EX #15	Motion of counsel for withdrawal enclosed with EX #14, which provided Appellant knowledge of intent to withdraw for the first time on or about July 13, 1996.
16.	EX #16	Motion for release of funds, from Hon. R. Kaye, informing Appellant of 7/23/96 hearing, received on or about July 13, 1996.
17	EX #17	Memorandum filed 7/18/96, *a priori*, for hearing of 7/23/96. (Only first three and last two pages are shown as rest is not relevant to withdrawal or release and would add unnecessary volume to the appended material.)
18	EX #18	Letter from Hon. George M. Lutz to Appellees giving notice of bankruptcy by facsimile transmission four days before 7/23/96 hearing of release motion (enclosures excluded from exhibit as unnecessary volume).
19	EX #19	Letter from Hon. George M. Lutz to Clerk of Trial Court giving notice of bankruptcy by facsimile transmission on 8/2/96.
20	EX #20	Motion on defects of 10/13/94 Order (Exhibit #7 above)

Respectfully submitted 10/3/96 by overnight delivery service:

"s/FRANK B. CARABELLO

Commonwealth Of Kentucky

Court Of Appeals

NO. 96-CA-2182-MR

FRANK CARABELLO — APPELLANT

V. APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 93-CI-0561

SHARON R. CARABELLO — APPELLEE

AND: NO. 96-CA-2299-MR

FRANK B. CARABELLO — APPELLANT

V. APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 93-CI-0561

SHARON R. CARABELLO;
REBECCA K. KAYE — APPELLEES

* * * * * *

ORDER

The appellant has moved this Court for an ex parte order seeking to reverse the release and restore certain funds or to require the posting of bond. The appellant's expressed reason for seeking relief ex parte is because he fears that appellees will renege on bankruptcy stipulations. That is not sufficient grounds for the granting of ex parte relief. It appears from the motion that the funds are currently protected by bankruptcy stay and emergency relief is not appropriate. Appellant's motion for ex parte relief is hereby DENIED.

Accordingly, the Court ORDERS that the appellant certify service of the motion and accompanying memorandum on counsel for the opposing side in this appeal. The

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APPENDIX "E2"- page 1: Note: Caption, date and signature captured in document by computer scan of official document. Text was typeset verbatim from official document to fit formatting requirements.

certificate of service will be filed with the Clerk of the Court of Appeals within ten (10) days of the date of this order.

Opposing counsel may file a response to the motion for CR 65.08 relief within fifteen (15) days of the date upon which the appellant certifies that a copy of the motion and memorandum have been served. This matter will then be submitted to the next sitting motion panel of the Court.

ENTERED: OCT - 8 1996

CHIEF JUDGE, COURT OF APPEALS

FILED

OCT 16 1996

CLERK
COURT OF APPEALS

AFFIDAVIT VERIFYING SERVICE

I, Frank B. Carabello, state that the following facts are true and correct as I verily believe. True and correct copies of this certification, the Order attached hereto, and the motion and memorandum cited in said Order were served on the Honorable Joseph F. Bamberger, at Boone Circuit Court, P. O. Box 480, Burlington, Kentucky 41005, and on the Attorney for Appellee Sharon R. Carabello and Appellee, the Honorable Rebecca K. Kaye, at the Kroger Building Suite 2525, 1014 Vine Street, Cincinnati, Ohio 45202-1144, by regular U.S. mail, on the 15th day of October, 1996.

FRANK B. CARABELLO

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF Berks

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me by said FRANK B. CARABELLO this the 15 day of October, 1996.

NOTARY PUBLIC
My Commission Expires:

NOTARIAL SEAL

This certification respectfully submitted to the Clerk of Court on this 15th day of October, 1996, by overnight delivery service: "s/Frank B. Carabello"

AOC-070
Rev. 1-93

FILED
AUG 28 1996
CLERK
COURT OF APPEALS

COURT OF APPEALS OF KENTUCKY

CIVIL APPEAL PREHEARING STATEMENT
Please consult CR 76.03(3) In completing this form.

Frank B. Carabello — APPELLANT

V. Court of Appeals Docket No. 96CA-2299
(Leave Blank)

Sharon R. Carabello, Rebecca K. Kaye — APPELLEE

Appeal From Boone County Circuit Court
Circuit Court - Action No. 93-CI-00561

Trial Judge: Hon. Joseph F. Bamberger

Date Judgment / Order Appealed From Entered 7-12-96 & 7-23-96 (three Orders), attached with explanation†

Date Notice Of Appeal Filed 8-9-96†
†See attached explanation sheet on notice of appeal.

Notice Of Cross Appeal N/A

Counsel For Frank B. Carabello (Appellant)
(Identify Party / Parties)
( ) Plaintiff; ( ) Defendant; (X) Other (specify) in trial court
Appellant Counsel: ↘Petitioner-Husband
Name Frank B. Carabello, Pro Se (negotiating with counsel)
Address 2250 Lincoln Avenue
City / State West Lawn, PA 19609 (per relocation in 1995)
Telephone 610/670-5662

Counsel For Sharon R. Carabello & Rebecca K. Kaye per fees, costs & expense of bus. valuation (Appellee)
(Identify Party / Parties)
( ) Plaintiff; ( ) Defendant; (X) Other (specify) in trial court
↘Respondent-wife

Appellant Counsel:

Name Hon. Rebecca K. Kaye - Wife's counsel

Address Kroger Bldg., Ste. 2525, 1014 Vine Street

City / State Cincinnati, Ohio 45202-1144

Telephone 513/784-1532

I. Has this case been before an Appellate Court previously NO
If so, when and identify _____

2. **Type of litigation** (type of order; e.g., automobile negligence, breach of contract, domestic, product liability, property dispute, tax, UCC, zoning, etc.) ** **Attach a copy of the complaint or other document Initiating the Circuit Court action**** Petition for divorce, amended for compensatory and punitive damages and for offset of domestic awards

3. **Circuit Court Disposition** (type of order; e.g., Default or Summary Judgment, Dismissal, etc.) **(Attach a copy of the final judgment and any separate written opinion by trial court.)** Orders adjudicated domestic claims, overruled new trial, released secured assets before damages resolved

4. **Relief:**

(a) Damages: Amount Sought ≥ 1,000,000.00*
*recovery impaired
*claims left unresolved funds & substantial rights divested
Amount Granted _____

Injunction- 7-23-96 order on banks to release

(b) Injunction: ( ) Granted ( ) Denied

(c) Other: Relief denied on verbatim enforcement of contract, protective order, acknowledgment of damages, timely access to jury trial rights and related relief denied.

5. **Facts and Issues:** (**Brief** statement of facts, claims, defenses and issues litigated.) (Attach a separate sheet if necessary.)
see explanation sheet, item #5 attached

6. Briefly state issues proposed to be raised on appeal (including jurisdictional challenges) and any question of first impression. (Attach a separate sheet if necessary.)
see explanation sheet, item #6 attached

7. Will the appeal turn on an interpretation or application of a particular case or statute? no If so, cite case or statute number. _____
8. Is there any known case involving substantially the same issue now pending before either appellate court of this state? no If so, identify. _____
9. Should this appeal be designated as a special appeal under CR 76.05? no Why or why not? Issues are too complex and too numerous, and record voluminous and may re-quire a brief in excess of 25 pages.

CERTIFICATION

I / We hereby certify that a copy of the foregoing statement was executed and a copy served on:
Appellees. c/o Hon. Rebecca K. Kaye, Kroger Bldg., Ste. 2525, 1014 Vine Street, Cincinnati, Ohio 45202-1144, and that the foregoing all referenced attachments were also served, the 20th and 27th days of August, 1996.

NOTE: Items 2 and 3 (above) require documents to be attached to this form for proper filing.

Frank B. Carabello 8-27-96
(Signature) (Date)

Name: **Frank B. Carabello**
Address: **2250 Lincoln Avenue**
West Lawn, PA 19609
610/670-5662

The filing of a civil notice of appeal suspends the running of time for further steps in the appeal - - see CR 76.03(14)

Commonwealth Of Kentucky

Court Of Appeals

95-CA-348-OA

FRANK B. CARABELLO — PETITIONER

V. ORIGINGAL ACTION
REGARDING BOONE CIRCUIT COURT

JOSEPH B. BAMBERGER; JUDGE
BOONE CIRCUIT COURT — RESPONDENT

* * * * * * * * * * *

ORDER DENYING CR 76.36 RELIEF

BEFORE: SCHRODER, EMBERTON and McDONALD, Judges

The Court has considered petitioner's petition and amended petition for writ of mandamus with attached material and two videotapes provided in support and petitioner's motion to reconsider denial of emergency relief. No response was filed to the petitions or to the motion. The Court, being otherwise sufficiently advised, ORDERS the petitions and the motion be DENIED. Petitioner has failed to demonstrate that the respondent judge has neglected to perform any duty devolving upon him.

ENTERED: APRIL 5, 1995

JUDGE, COURT OF APPEALS

APPENDIX "E4": Note: Part of the caption, the date and the signature were captured in E4 by computer scan of official copy of the order. The text was typeset verbatim from that copy to fit formatting requirements.

Supreme Court, U.S.
FILED
DEC 2 1997
CLERK

No. 97-671

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

CARABELLO, FRANK Petitioner

V

CARABELLO, SHARON, ET AL. Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

SUPPLEMENTAL BRIEF OF PETITIONER ON INTERVENING CONTEMPT ACTION

Frank B. Carabello, pro se
2855 Wilson School Court
Sinking Spring, PA 19608
(610) 670-5662

QUESTIONS PRESENTED FOR REVIEW

DOES REDRESS EXIST FOR INJURY FROM JUDICIAL ACTS THAT OVERRIDE SECURED RIGHTS, AND WHERE THE INJURY IS READY TO EXPAND ON INTERVENING CONTEMPT ACTION, WHAT REDRESS IS PROPER.

IS JUDICIAL CONSTRUING, BY A STATE TRIAL COURT, A SUPREME AND UNCHANGEABLE EDICT, SUPERIOR TO FOURTEENTH AMENDMENT RIGHTS, WHERE IRREVOCABLE DEPRIVATION OF SECURED RIGHTS IS PLAIN.

HAVE STATE JUDICIARY ACTED OUTSIDE JURISDICTION OR DUTY IN A CASE WHERE FOURTEENTH AMENDMENT RIGHTS HAVE BEEN IRREVOCABLY AND WILLFULLY DEPRIVED.

WHERE A STATE TRIAL COURT HAS DENIED EQUAL PROTECTION OR DUE PROCESS, DOES APPELLATE COURT DUTY REQUIRE AT LEAST INQUIRY INTO RECORDS ALLEGED TO SHOW OBSTRUCTION, IF EQUITY DISTRIBUTION (ON THE FACE OF ORDERS APPEALED) MANIFESTLY HAS OVERRIDDEN LEGAL CLAIMS AND VESTED RIGHTS.

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I. INTERVENING CONTEMPT ACTION UNDERSCORES THAT RIGHTS CAN BE HAD IF, AND ONLY IF, PETITION FOR WRIT OF CERTIORARI IS GRANTED.

Albeit granting Petition for Writ of Certiorari in this Court is a privilege, the characteristics in this case invite that action, because great and immediate irreparable harm is manifest (Younger v Harris, (1971) 401 US 37 at 46). The Kentucky courts have applied rules and laws in a manner that has irrevocably deprived Fourteenth Amendment rights and obstructed legal claims. This caused the intervening circumstances that now put Petitioner at risk of losing liberty. The action in Kentucky should not be permitted to continue its present course. That course has denied remedies (irrespective of the merits) and used equity issues to obstruct resolution of legal claims. Contempt action based on equity division (hereafter ED) is now before the Kentucky Boone Circuit Court (hereafter trial court). A contempt order will defeat resolution of Petitioner's legal claims and rights without any possibility of a proper court ever reaching the merits. It is manifest that the trial court proceeding have deprived due process and equal protection.

The trial court willfully withheld access to injury issues from July 19, 1994 forward. On July 12, 1996, it remanded these to its docket, while exercising its powers of final ED. This was irrespective of losses caused by injury. This created orders that can not be complied with and is an unconstitutional, irrevocable deprivation of vested rights. Appeal of this was denied February 11, 1997. State discretionary review was denied on August 27, 1997. After serving the Petition for Writ of Certiorari in this case, Respondents retaliated with contempt charges against Petitioner, using the ED orders previously appealed in Kentucky as grounds. The contempt action has been set for hearing in the trial court on December 9, 1997. Because Petitioner's injury and abuse at the hands of the trial court has deprived livelihood, he has no means to comply with its orders. The contempt action puts Petitioner's liberty at risk, and imposes immediate risk of

further irreparable harm. Petitioner asserts that the prior abuse has given him cause to fear the trial court, that he lives in constant fear, and that he can not return to that court. Moreover, he can not travel within its jurisdiction, which prevents access to the federal district court where his legal claims now must be resolved.

Petitioner's legal claims can not be properly resolved if the trial court retains jurisdiction. This is manifest from the obstruction of injury issues from July 19, 1994 forward. Resolution of legal claims was willfully obstructed and his injury has progressed on remedies withheld. The trial court did not retain the powers of remedy. It allowed the injury to expand beyond these powers, by delaying resolution of legal claims. Although contempt for non-compliance with ED now is all that concerns the trial court, due process can not be had, unless the obstruction of legal claims is resolved first. FRCP 18(b)/KRCP 18.02.

Procedural due process is meant to protect persons from mistaken or unjustified deprivation of life, liberty or property, Carey v. Piphus (1978) 435 US 247. State can not deny due process or engage in invidious discrimination, Douglas v California (1993) 372 US 353. It is established that due process can be deprived in the course of construing otherwise valid state statute, Bouie v Columbia (1964) 378 US 347. The situation in this case is that the state courts denied due process, and divided equity irrespective of injury. The fact of this miscarriage of justice is plain. This has been raised, preserved, and passed on by the Supreme Court of Kentucky. Petitioner has exhausted his state court remedies.

Proceedings in the trial court now serve no legitimate purpose, because that Court retained jurisdiction without retaining powers of remedy. ED has been resolved there and the only issues that remain involve obstruction and legal claims. The trial court has neither the resolve nor the ability to adjudicate these. It can only use the jurisdiction it retained to cause further injury and deprivation. If there is anything the

trial court can do with its powers at this late date, it is that and only that.

The rules and laws abused by the trial court are involved in numerous cases annually. Abuse of these has irrevocably deprived vested rights. If Petition is not granted, the Kentucky courts would be advised that the public has no adequate redress for judicial acts repugnant to the Fourteenth Amendment.

Such an advisory would strip that Amendment of all meaning where ED willfully is adjudicated in a manner to override legal claims arising from abuse during state proceedings. The contempt action of the Respondents in this case emphasizes the need for action in this Court. This case involves application of the enormous powers of state court to defeat a citizen with no powers, other than rights vested by The Constitution. The public should be able to depend on federal redress, when state courts deny vested rights. These are said to be available to all citizens. Petitioner prays that these will be made available to him in this case. The prevailing standards seem to be the doing of justice and the will of the law. Certiorari is the only means to reach those standards in this case.

Petitioner asserts that granting the Petition in this Court is the only way due consideration will be given to the duty withheld in Kentucky. The quote of Chief Justice Marshall, in Littleton v. Berbling (7th Cir. 1972) 468 F 2d 389 at 412, puts duty as follows:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving the will of the judge; always for the purpose of giving the will of the legislature; or, in other words, to the will of the law."

Petitioner has phrased the questions originally presented in accordance with the intervening contempt action. He presents the standards involved as follows.

II. ADEQUATE REDRESS EXISTS FOR INJURIOUS JUDICIAL ACTS THAT OVERRIDE RIGHTS SECURED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, IF AND ONLY IF, FEDERAL INTERVENTION IS MADE AVAILABLE.

The Fourteenth Amendment of the United States Constitution guarantees state judicial acts will not override secured rights. Remedy for deprivation of these rights lies with the state courts only to the extent that these courts act timely and in accordance with the law. If redress by state courts has been exhausted and these fail duty to retain power of remedy, then judicial inquiry by federal court(s) is the only adequate redress available.

III. JUDICIAL CONSTRUING IN A STATE TRIAL COURT IS NOT A SUPREME AND UNCHANGEABLE EDICT, SUPERIOR TO FOURTEENTH AMENDMENT RIGHTS; — WHERE DEPRIVATION OF RIGHTS IS PLAIN, FEDERAL INTERVENTION IS APPROPRIATE.

In a state civil case, where rules of procedure and laws are willfully applied to obstruct legal claims—and override all conflicting rights of property, due process and equal protection—there exists judicial deprivation of vested rights, under color of law. Judicial duty is to the will of the law and willful disregard thereof can never be applied as a supreme and unchangeable edict, superior to Fourteenth Amendment rights. But, that has been done in Kentucky. Thus, it would appear that the intervening contempt action is a willful attempt to retaliate for Petitioner's efforts to seek justice in federal court.

IV. STATE JUDICIARY ACT OUTSIDE JURISDICTION OR DUTY IN A CASE WHERE FOURTEENTH AMENDMENT RIGHTS ARE IRREVOCABLY AND WILLFULLY DEPRIVED.

In a divorce case where legal claims arise from loss of business, and injury therefrom substantially devalues equity before division thereof, state judiciary act outside jurisdiction and duty and irrevocably deprive Fourteenth amendment rights—if (a.) non-cognizable equity issues are willfully used to obstruct legal claims, (b.) counsel and judiciary willfully act together to obstruct the will the law, or conspire to deprive redress for legal claims and shield tortfeasors, or if (c.) orders not reciting (form FRCP 54(b)/KRCP 54.02) final language, divide and distribute equity remains, remand legal claims, and rule res judicata on the acts of tortfeasors. All the aforementioned acts took place in the trial court and further injustice appears to be the sole basis for the contempt action pending there.

V. APPELLATE STATE COURTS WITHHOLD DUTY AND DENY EQUAL PROTECTION OR DUE PROCESS, WHERE THERE IS NO INQUIRY INTO RECORDS ALLEGED TO SHOW OBSTRUCTION, IN A CASE WHERE EQUITY DISTRIBUTION (ON THE FACE OF ORDERS APPEALED) MANIFESTLY HAS OVERRIDDEN LEGAL CLAIMS AND VESTED RIGHTS.

State appellate duty requires at least inquiry into records involving obstruction, especially where equity distribution (on the face of orders appealed) manifestly has overridden legal claims and rights to due process and equal protection. An appellate state court withholds duty, denies equal protection and due process, and obstructs redress, where appeal is dismissed irrespective of the merits, especially, where orders evidence trial court abuse, obstruction and deprivation of rights on the face. Upon such evidence, an appellate state court must review merits for interlocutory relief and appeal,

and must override trial court's remand of legal claims and withholding of (FRCP 54(b)/KRCP 54.02) language. Thus, the state appellate courts did not act on the evidence or the issues presented, as required by duty.

No legitimate construing of rights and laws can justify the Kentucky court orders. The disregard of duty is plain from the record in this case. State appeal, although the preferred method of remedy, provides no means for relief because it has been repeatedly denied in the past, irrespective of the merits. From 1994 forward, Petitioner has challenged the trial court's obstruction. He has been discriminated against because of his challenges on deprived due process and equal protection. His non-marital property was seized without the granting of a hearing and his property then was released to his former wife about two years later. The acts taken by Kentucky judiciary are individual, not the will of the law. The involved judiciary willfully disregarded their official character and have overridden the superior authority of The United States Constitution and rights secured by the Fourteenth Amendment.

The contempt action shows that Respondents treat the law as if it were irrelevant, because there is no law on which to base contempt for non-compliance (with ED orders), where the inability to comply and pay a party is due to the destruction caused by that party. Respondents all were fully advised in 1994-5 of the destruction of Petitioner's livelihood and the cause, and their contempt action interferes with Petitioner's attempts at resolution in federal court. Justice can not be assured without granting the relief requested herein.

CONCLUSION

This case presents serious due process and equal protection issues concerning rules of civil procedure and laws that are invoked in numerous cases annually. Petitioner respectfully requests this Court to grant Certiorari to review the issues, and to invite Respondents to show cause for pursuing any further action in the trial court, be it for contempt or for unresolved legal claims or for equity division.

This brief respectfully submitted the 2nd day of December, 1997, By:

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CERTIFICATION

I, Frank B. Carabello, hereby certify that the foregoing SUPPLEMENTAL BRIEF ON INTERVENING CONTEMPT ACTION is presented in good faith and not for delay, and declare under penalty of perjury that this is true and correct as I verily believe.

Frank B. Carabello

FRANK B. CARABELLO